

**Supplemental Letter of Findings Number: 04-20110274**  
**Sales and Use Tax**  
**For Tax Years 2006-09**

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**ISSUE**

**I. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-2](#).

Taxpayer protests the imposition of use tax on some purchases it made during the audit period.

**STATEMENT OF FACTS**

Taxpayer operates retail stores in Indiana and other states. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not been collecting and remitting sales tax on some items it sold in its stores which were subject to sales tax. Also, the Department determined that Taxpayer had not paid sales tax on items it used in its Indiana operations. The Department therefore issued proposed assessments for sales tax, use tax, interest, and ten percent negligence penalties for the tax years 2006, 2007, 2008, and 2009. Taxpayer disagreed with some of the items listed as taxable and filed a protest of the imposition of a portion of the sales tax, use tax, and of the imposition of penalties. Through correspondence conducted prior to an administrative hearing, most of the items listed as subject to sales tax were removed from the list of taxable items. An administrative hearing was held concerning the remaining items and Letter of Findings 04-20110274 ("LOF") was issued on December 28, 2011. Upon receipt of the LOF, Taxpayer requested a rehearing to address two remaining use tax issues with which it disagreed. The rehearing was granted, Taxpayer provided additional documentation and analysis, and this Supplemental Letter of Findings ("SLOF") results. The LOF and its reasoning are hereby incorporated into this SLOF, except for the two categories discussed in the SLOF. Further facts will be presented as required.

**I. Use Tax—Imposition.**

**DISCUSSION**

Taxpayer protests that use tax is not due on two categories of purchases it made in the audit years of 2006 through 2009. The first category concerns purchases made through expense accounts which the Department determined were for tangible personal property. Taxpayer protests that these purchases were for services and are not subject to sales or use taxes. The second category concerns amounts which Taxpayer paid to a contractor for painting services. The LOF did address the second category, but determined that the invoices to which Taxpayer referred were not those listed in the audit report and were therefore not relevant. As explained in the LOF, the Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

As explained in the LOF, the sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

The first category which Taxpayer protests is not subject to use tax concerns purchases made through expense accounts which Taxpayer states were for services. The Department conducted an "A/P Expenses-Statistical Sample" and made its calculations with these six accounts as taxable. The LOF did not address this portion of Taxpayer's protest; therefore this is the first discussion of this issue. A review of the six

accounts at issue shows that these are for services and not for the purchase of tangible personal property. The six accounts are for: pest control, floor cleaning, window washing, common area maintenance, internal/external painting, and rent. These six accounts will be reclassified as non-taxable in the A/P Expenses-Statistical Sample and the taxable percentage will be recalculated.

The second category which Taxpayer protests is not subject to use tax concerns six invoices which Taxpayer states are not subject to use tax since they are for services provided by a painting service. The LOF initially denied the protest on these invoices even though they qualified for the exemption provided under [45 IAC 2.2-4-2](#), based on the determination that the invoices provided were not those listed in the sample in the audit report. At the rehearing, Taxpayer was able to establish that the invoices were those listed in the audit report. Therefore, since the invoices are listed in the audit report and since the services qualify for the exemption found at [45 IAC 2.2-4-2](#), these six invoices will be reclassified as non-taxable in the sample population and Taxpayer's use tax compliance percentage will be recalculated.

In conclusion, the six expense accounts will be reclassified as non-taxable services in the A/P Expenses-Statistical Sample. The six invoices for the painting service will be reclassified as non-taxable in the sample population and Taxpayer's use tax compliance percentage will be recalculated. Otherwise, all findings in LOF 04-20110274 remain the same.

#### **FINDING**

Taxpayer's remaining two protest items are sustained.

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